No. 85-1699

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

LaSALLE NATIONAL BANK OF CHICAGO, as Trustee under Trusts Numbered 40244, 53645, 100385 and 100386, UNITY VENTURES, and WILLIAM ALTER,
Petitioners,

v.

THE COUNTY OF DuPAGE, a body politic, THE BOARD OF COMMISSIONERS OF DuPAGE COUNTY, a body politic, THE VILLAGE OF LISLE, a municipal corporation, and
THE VILLAGE OF WOODRIDGE, a municipal corporation,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

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REASON FOR DENYING THE WRIT

The Seventh Circuit's decision is fully consistent with its decision in the *Town of Hallie* case which was unanimously affirmed by this Court last term. Therefore, this case is not appropriate for review by way of Certiorari.

ARGUMENT

I. The Premise on Which the Petition is Based is Fallacious.

Petitioner (hereinafter "plaintiffs") commences its Petition for Writ of Certiorari ("Petition") with the following wholly inaccurate description of this case.

> This case brings to this Court the issue of first impression whether general state laws allowing units of local government to cooperate can be read to create broad immunity for anticompetitive concerted action by local government units even when the particular actions at issue are not authorized by state law. *Petition,* p. 3.

Plaintiffs proceed from this fallacious premise—that this case involves only "general state laws" permitting cooperation with no authorization of the "particular actions at issue"—and contend that the state authorization here is no more than the sweeping grant of home rule powers in *Boulder. Community Communications Co. v. City of Boulder,* 455 U.S. 40 (1982). However, a reading of plaintiffs' Complaint, as analyzed by the Seventh Circuit, confirms that this is quite a different case from the one mis-described by plaintiffs; not one of "first impression," but one which was addressed by this Court last term and unanimously decided adversely to plaintiffs. *Town of Hallie v. City of Eau Claire,* 105 S.Ct. 1713 (1985).

Here, each of the cooperative acts, characterized by plaintiffs as being only generally authorized, were in fact expressly state authorized. The units of local government were not merely told to go forth and "do as they please...," as in *Boulder,* 455 U.S. at 55. Rather, here the defendants were told by the state legislature (1) that communities abutting unincorporated areas are authorized to participate in the county rezoning process; (2) that municipalities are not required to extend utilities (including water) beyond their boundaries, and they are expressly authorized to enter into boundary agreements, allocating unincorporated territory lying between them for annexation by each; and (3) that units of local government are state authorized jointly to address, with the Illinois Environmental Protection Agency, the collection and treatment of sewage.

Thus, the conduct characterized in plaintiffs' Complaint as an antitrust conspiracy was nothing more than state authorized cooperation and joint action directed to specific, underlying conduct which was itself independently state authorized. The

obvious consequences predictably would not be the unbridled "competition" desired by plaintiffs, but rather the cooperative, joint intergovernmental activity desired and authorized by the legislature of the State of Illinois. This Court ruled unanimously last term that foreseeably anticompetitive consequences of expressly state authorized conduct were immune from antitrust prosecution under the state action doctrine first announced in *Parker v. Brown,* 317 U.S. 341 (1943). *Town of Hallie v. City of Eau Claire,* 105 S.Ct. 1713 (1985). Accord, *Fisher v. City of Berkeley,* 106 S.Ct. 1045 (1986).

II. Each of The Cooperative Acts of Defendants was Expressly State Authorized.

Plaintiffs seek to avoid the controlling effect of *Town of Hallie* by claiming that their allegations of concerted action, or cooperation, among defendants distinguish this case and that the Court of Appeals failed to consider plaintiffs' allegations of concerted action "in determining what rule of immunity to apply." These contentions are without merit and provide no basis for review by this Court.

The very "concerted action" plaintiffs allege is precisely authorized under the Illinois Constitution and statutes. The Court of Appeals painstakingly measured the specific authorization of that "concerted action," and found that it met the standards of *Town of Hallie* and *Boulder.* Since both the objective conduct of the municipalities, and the joint nature of aspects of that conduct, were expressly authorized by statute, the Court of Appeals properly determined that *Boulder—Town of Hallie* state action immunity applied.

The following quotations from the opinion of the Seventh Circuit concisely summarize the express authorization of defendants' cooperative conduct:

> A. *Sewage Treatment.* The State of Illinois authorizes counties and municipalities to contract together and combine resources for the provision of sewage treatment. Ill. Ann. Stat. ch. 34, § 3111 (Smith-Hurd 1985 pocket part)(counties "may furnish... sewerage service...to municipal corporations...[and] may enter into and perform contracts...with any municipal[ity],... for the furnishing... of... sewerage service"); Ill. Ann. Stat. ch. 24, § 11-147-4 (Smith-Hurd 1962)("Any municipality lying wholly or partly within the boundaries of any county which accepts the provisions of 'An Act in relation to water supply, drainage, sewage, pollution and flood control in certain counties,' [Ill. Ann. Stat. ch. 34, § 3101-3123] may contract with such county for water supply or sewerage service to or for the benefit of the inhabitants of the municipality"); Ill. Ann. Stat. ch. 111-½, § 1046(b) (Smith Hurd) 1977)("in order to be eligible for federal grants for construction of sewage works pursuant to Section 201(g) of the Federal Water Pollution Control Act Amendment of 1972 (P.L. 92-500), any municipality, county, special district or other unit of local government ... that owns or operates sewage works may adopt ... ordinances or regulations to provide for systems of proportionate cost sharing for operation and maintenance by recipients of such unit's waste treatment services."). The legislature has also expressly authorized the IEPA "to engage in planning processes and activities and to develop plans in cooperation with units of local government ... in connection with the jurisdiction or duties of each such unit ...." Ill. Ann. Stat. ch. 111-½, § 1004(n) (Smith-Hurd 1977). *Petition,* Appendix pp. B-7 and B-8.
>
> B. *Zoning.* The Illinois state legislature has specifically granted counties the power to regulate zoning in unincorporated areas. Ill. Ann. Stat. ch. 34, § 3151 (Smith-Hurd 1985 pocket part). The legislature has also expressly authorized counties "to cooperate ... with cities, villages or other municipal corporations either within or without such county" in all matters relating to zoning. Ill. Ann. Stat. ch. 34, § 3159 (emphasis added)(Smith-Hurd 1960). We think that these statutes constitute State of Illinois authorization for consultation between the County

and Villages regarding the Developer's special use permit petition. *Petition,* Appendix, p. B-10.

C. *Boundary Agreement.* The Illinois Constitution, Art. VII, Section 10(a) entitled "Intergovernmental Cooperation" authorizes units of local government to "associate among themselves" to "transfer any power or function." Illinois statutory law gives localities the power to annex any unincorporated area that is contiguous to its corporate limits, Ill. Ann. Stat. ch. 24, § 7-1-1 (Smith-Hurd 1985 pocket part), and to provide water service to residences outside their boundaries, Ill. Ann. Stat. ch. 24, § 11-149-1 (Smith-Hurd 1985 pocket part). In agreeing to divide the unincorporated territory lying between them for purposes of water service and annexation the Villages did nothing more than "transfer" powers they had been given by the Illinois State legislature. Furthermore, the Village of Lisle's refusal to deal with Hobson Greene for provision of water pursuant to the boundary agreement is authorized by Ill. Ann. Stat. ch. 24, § 11-149-1 (Smith-Hurd 1985 pocket part) which has been interpreted as authorizing localities to decline to provide water service to residences outside their boundaries. See *Exchange National Bank of Chicago v. Behrel,* 9 Ill.App.3d 338, 341, 292 N.E.2d 164, 166 (1st Dist. 1972) (§ 11-149-1's provision that municipality "may" provide for extension of municipal sewers and water main implies that such extension of service is discretionary). *Petition,* Appendix, pp. B-13 and B-14.

The same Court of Appeals that decided the *Town of Hallie* case (which this Court unanimously affirmed last term), after an elaborate statutory analysis, here found express authorization for all of the conduct challenged by plaintiffs and concluded that the State of Illinois had expressly eschewed "competition," as the mechanism for allocating the resources in question, in favor of cooperation and regulation. Under *Parker v. Brown* and its progeny, through *Town of Hallie,* federal antitrust courts are required to respect such state legislative decisions. That is precisely what the Court of Appeals for the Seventh Circuit did here, following this Court's unanimous affirmance last term of its decision in *Town of Hallie.*

CONCLUSION.

Plaintiffs seek to persuade this Court to grant their Petition and review this case by ignoring the express and specific state authorization of defendants' cooperative activities. The opinion of the Court of Appeals, some of which is quoted above, exposes that fundamental flaw in plaintiffs' Petition, and fully refutes plaintiffs' effort to misstate the facts and applicable law.

WHEREFORE, for the foregoing reasons, defendants request that the Court deny plaintiffs' Petition.

Respectfully submitted,

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